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Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

71-661

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JOSEPH ANTHONY DAVIS,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 13, 1971.

Opinions Below

The first opinion of the Court of Appeals is reported at 432 F.2d 1009 and is set out in the Appendix, *infra*, at p. 1. The oral findings of the district court following the hearing on remand are set out in the Appendix, *infra*, at pp. 2-6. The district court's findings of fact and conclusions of law following the hearing on remand are unreported and are set out at pp. 7-11, in the Appendix, *infra*. The second Court of Appeals opinion affirming petitioner's conviction is reported at 4 SSLR 3398 and is set out in the Appendix, *infra*, at p. 15. The order denying rehearing is set out at p. 16 of the Appendix, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction was entered on September 13, 1971. The time within which to file a petition for certiorari was extended until November 12, 1971, by Mr. Justice Douglas. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals erred as a matter of law in determining that petitioner's armed forces induction was not accelerated in violation of *Gutknecht* v. *United States*, 396 U.S. 295 (1970) or otherwise accomplished pursuant to unlawful delinquency procedures.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the Fifth Amendment to the Constitution of the United States; the Military Selective Service Act of 1967 (50 U.S.C. App. §§451 et seq.); Title 32 C.F.R. §1642 (1969); §1631.7 (1969); and §1631.7 (1970).

Statement of the Case

Petitioner registered with Selective Service Local Board No. 101, Los Angeles, California, on October 4, 1963 (A. 17a).* On February 3, 1965, he was classified I-A. On February 16, 1965, he was ordered to report for an Armed Forces physical examination on March 4, 1965 (A. 17a).

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* "A" references refer to the appendix to this petition.

On the appointed day, petitioner failed to report but subsequently contacted the local board and explained that his failure to report was due to illness (SSF 28).* On September 19, 1965, petitioner was ordered to report for a pre-induction physical examination on October 8, 1965 (A. 17a, SSF 30). The order was mailed to a post office box address in Los Angeles supplied to the local board by petitioner. On September 22, 1965, the order was returned to the local board, stamped "Addressee Unknown" (SSF 31). Petitioner did not report for his pre-induction physical on October 8, 1965. Subsequently, on December 6, 1965, petitioner was mailed a California Selective Service Form 304, "Delinquency Warning" (SSF 32), which notified petitioner that his local board was "considering declaring you to be delinquent . . ." and further that,

> "A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants . . : any further noncompliance on your part could result in your immediate induction." (SSF 32).

This notice was mailed to the same Los Angeles post office box as the previous physical examination orders had been mailed to. In addition, the "Delinquency Warning" was mailed to another Los Angeles address, "3781¼, Menlo." The "warnings" were received back at the local board on December 15, 1965, and April 14, 1966, respectively, stamped "Unknown" (SSF 33-35). Thereafter, on May 4, 1966, petitioner's local board declared him to be

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* "SSF" references refer to petitioner's paginated Selective Service File, Government's Exhibit 1 in the trial court.

a delinquent pursuant to 32 C.F.R. §1642, et seq., and mailed him a Delinquency Notice, SSS Form 304 (A. 18a) at the "Menlo" address. On the same day, petitioner appeared at the local board and completed a Current Information Questionnaire, again giving the "Menlo" address as his current mailing address (SSF 41). Thereafter, on February 27, 1967, petitioner was ordered to report for induction (A. 19a). On the face of the induction order was typed the word "Delinquent" (A. 19a). Mailed to the "Menlo" address, the order was returned to the local board undelivered on February 23, 1967 (SSF 44).

On the day set for his induction, March 7, 1967, petitioner did not report (A. 17a). His selective service file was subsequently forwarded to the California State Headquarters of Selective Service for review. It was returned to the local board with instructions from the State Director to reorder petitioner for induction by mailing such an order to a third address in St. Paul, Minnesota, previously supplied to the local board by petitioner (SSF 46). On June 20, 1967, an order to report for induction on July 11, 1967 was mailed to petitioner at his Minnesota address. As did the previous induction order, the order of June 20th had the word "Delinquent" typed on its face (A. 20a). The Minutes of Action (A. 17a), also reflect that petitioner was ordered "as Del[sic]." On July 11, 1967, petitioner failed to report for induction. His prosecution followed.

Proceedings Below

Petitioner was originally tried to a jury and convicted of having failed to report for induction on the July 11, 1967, date. On appeal, the Ninth Circuit remanded "without limitation of scope but especially for consideration of the case in the light of . . . *Gutknecht* v. *United States* . . . ." 432 F.2d at 1010. On remand the district court, Hauk, *D.J.*, found:

> ". . . 21 others were younger than [petitioner and] were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration.
>
> Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction."
> (A. 3a-4a)

Judge Hauk went on to hold that:

> ". . . even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD 62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service law, and this 1602.4 has not been outlawed either by Gutknecht" (A. 4a).*

On the second appeal, the Ninth Circuit, in a short *per curiam*, affirmed, finding no "acceleration" within the meaning of *Gutknecht* v. *United States*, 396 U.S. 295 (1970). In addition, the court below ruled, without explanation, that the plainly conflicting opinion of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971), was "distinguishable."

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* In support of these contentions, the district court relied substantially on the reasoning of Judge Neville of the Minnesota District Court in *United States* v. *Crocker*, 313 F. Supp. 831 (1970), which, we respectfully submit, is totally in error.

Reasons for Granting the Writ

Certiorari should be granted because the decision below is in conflict with decisions of the Courts of Appeals for the Fourth and Fifth Circuits; because the Court below has misconstrued and misapplied the decision of this Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970); because there appears to be an unresolved and apparently irreconcilable conflict among different panels of the court below;[1] and because the case presents important constitutional and statutory questions affecting the administration of the Selective Service laws which have not been, but which should be, settled by this Court.

The quantity of litigation engendered by this Court's decision in *Gutknecht* v. *United States, supra,* has been substantial. Its application to a multifarious variety of selective service cases[2] in the lower federal courts has

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[1] Despite the perplexing inconsistencies in decisions of the Court below, see, *infra*, p. 8, a petition for rehearing *en banc* was denied (A. 16a). This Court has not hesitated to grant certiorari to resolve an intra-circuit conflict on important and recurrent questions, *Dickinson* v. *Petroleum Conversion Corporation*, 338 U.S. 507 (1949). However, the Court may deem it more appropriate to remand for an *en banc* hearing. See *United States ex rel. Robinson* v. *Johnston*, 316 U.S. 649 (1942); see also *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[2] See, e.g., *United States* v. *Kelly*, 314 F. Supp. 500 (E.D.N.Y. 1970); *Foster* v. *United States*, 320 F. Supp. 646 (D. Conn. 1970); *United States* v. *Rumon*, 315 F. Supp. 1126 (W.D. Pa. 1970); *Swartz* v. *United States*, 3 SSLR 3424 (D. Cal. 1970); *Bradley* v. *Laird*, 315 F. Supp. 544 (D. Kan. 1970), aff'd —— F.2d ——, No. 409-70 (10th Cir. Oct. 28, 1971); *Andre* v. *Resor*, 313 F. Supp. 957 (N.D. Cal. 1970), aff'd 443 F.2d 921 (9th Cir. 1971); *Akeson* v. *United States*, 4 SSLR 3430 (D. Colo. 1970); *Kittrell* v. *United States*, 4 SSLR 3439 (N.D. Fla. 1971); *Mikesell* v. *United States*, 3 SSLR 3390 (W.D. Mich. 1970); *Cook* v. *United States*, —— F. Supp. ——, 70 Civ. 4528 (S.D.N.Y. 1971); *McGee* v. *United*

given rise to numerous problems in ascertaining the proper application of *Gutknecht*, both generally with respect to the invalidation of Selective Service delinquency regulations, and specifically in determining precisely what is meant by "acceleration" in the area of "order of call." Compare, e.g., the decision below with the conflicting decisions of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971), and the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801 (1970).

Nothing could more underscore the confusion caused by this proliferation of delinquency-related litigation than the inconsistent and seemingly irrational application of the *Gutknecht* decision by different panels of the Ninth Circuit itself. Compare the dispositions reached in *United States* v. *Thomas*, 422 F.2d 1327 (1970); *United States* v. *Broyles*, 427 F.2d 358 (1970); *United States* v. *Stow*, 427 F.2d 891 (1970); *United States* v. *Supina*, 428 F.2d 1226 (1970); *United States* v. *McQueary*, 429 F.2d 984 (1970); *United States* v. *Townsend*, 431 F.2d 702 (1970); *United States* v. *Kohls*, 441 F.2d 1076 (1971) with *United States* v. *Pennington*, 439 F.2d 145 (1971) cert. den. 399 U.S. 523 (1971); and *United States* v. *Davis*, 432 F.2d 1009 (1970) (hereinafter Davis I).

Petitioner respectfully submits that settlement of the growing intercircuit and intracircuit conflict and the determination of the proper application of the *Gutknecht* doctrine and the clarification of the meaning of "acceleration" requires resolution by this Court.

States, —— F. Supp. ——, 71 Civ. 2544 (S.D.N.Y. 1971) (granting motion under 28 USC §2255, notwithstanding this Court's opinion at —— U.S. —— (1971)). Compare *United States* v. *Crocker*, 313 F. Supp. 831 (D. Minn. 1970).

Certiorari should be granted to determine whether the Court of Appeals erred in affirming the District Court's finding that petitioner's induction was not in violation of *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

A. "*Acceleration*" *Within the Meaning of* Gutknecht.

32 C.F.R. §1642.4, at all times pertinent hereto, described a selective service delinquent as one who has "failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction. . . ." In *Gutknecht* v. *United States*, 396 U.S. 295 (1970), the duty transgressed was the requirement that a registrant have in his personal possession a registration certificate and current classification notice. 32 C.F.R. §§1617.1; 1623.5. Here, the case is similar to *Peet* v. *United States*, 399 U.S. 523 (1970), vacating 420 F.2d 549 (9th Cir. 1969), where the petitioner had been convicted of failing to report for induction as a delinquent—his delinquency status stemming from a prior refusal to undergo a pre-induction physical examination in violation of 32 C.F.R. §1627. See also *United States* v. *Kohls*, *supra*, 441 F.2d at 1077.

Delinquency status, prior to this Court's decision in *Gutknecht*, permitted, *inter alia*, three types of action to be taken by a local board which would hasten a registrant's induction. First, he could be reclassified from a deferred or exempt status into classification I-A (available for military service). 32 C.F.R. §1642.12. Second, a registrant in Class I-A, either classified properly or as the result of a "punitive reclassification" under 1642.12, *supra*, could be inducted prior to all other registrants under the then prevailing regulatory scheme. See 32 C.F.R. §§1642.13;

1631.7; *Gutknecht, supra,* at 298. The third possibility, and one *not* dealt with in *Gutknecht,* was that 32 C.F.R. §1631.7, as then in effect, permitted the induction of a registrant who was delinquent and I-A "notwithstanding the fact that he has not been found acceptable for service in the armed forces and has not been mailed a Statement of Acceptability (DD Form No. 62)." 32 C.F.R. §1631.7 (1963). See *United States* v. *McClintock,* 2 SSLR 3685 (N.D. Cal. 1970). Other than delinquents, the only registrants who could be inducted without a pre-induction physical examination were volunteers, see 32 C.F.R. §1628.10 (1951), or conscientious objectors classified I-O. 32 C.F.R. §1660.20(a); *United States* v. *Hayden,* 445 F.2d 1365, 1370 (9th Cir. 1971).

Thus, delinquent registrants could be subjected to a third form of treatment which we submit is in violation of the congressional mandate relied upon in *Gutknecht, supra,* that "selection of persons for training and service [be carried out] in an impartial manner. 50 U.S.C. App. §455(a)(1) (1964 ed., Supp. IV)." 396 U.S. 304.

B. *The Erroneous View of Acceleration of the Courts Below.*

The district court understood the *Gutknecht* rule to require (1) a finding that no younger men were inducted ahead of petitioner (A. 8a, ¶5, 9a, ¶3) and/or (2) that the pre-*Gutknecht* version of 1631.7, permitting the induction of delinquents without pre-induction physical examinations, was permissible since (a) 1631.7 had not been specifically declared invalid by *Gutknecht* and (b) because any other reading would in the court's belief, "render negatory [sic] and completely unworkable the entire Selective Service System" (A. 5a). We submit that both these views are legally and factually erroneous and the uncritical adop-

tion of them by the Ninth Circuit without explanation, creates a substantial conflict with the Fourth and Fifth Circuits, and exacerbates the pre-existing confusion in the Ninth Circuit.[3]

C. *The Court Below Erred in Holding That Petitioner's Induction Was Not Invalid Under* Gutknecht *and That the Government Had Sustained Its Burden of Proof. The Decision Below Is in Conflict With the Decision of the Fourth Circuit in* United States v. Dobie, *429 F.2d 32.*

It has long been held in selective service cases that, absent a showing to the contrary, the Selective Service Sys-

[3] The *per curiam* decision below (A. 15a) cites three prior Ninth Circuit decisions, *Davis I*, 432 F.2d 1009, *Misenheimer* v. *United States*, —— F.2d ——, No. 71-1384 (July 22, 1971), and *United States* v. *Pennington*, 439 F.2d 145, decided March 11, 1971. The confusion is highlighted by considering *Pennington*, where a panel of the Ninth Circuit indicated its dissatisfaction with the presumption of acceleration doctrine which had been applied by other panels in *Thomas, supra*, decided Feb. 9, 1970; *Stow, supra*, decided May 27, 1970; *Broyles, supra*, decided June 8, 1970; *Supina, supra*, decided June 22, 1970; *McQueary, supra*, decided Sept. 4, 1970; and *Townsend, supra*, decided Sept. 14, 1970. The *Pennington* panel favored a new rule of remand, noting that remand had been directed in *Davis I* (A. 1a).

Yet a subsequent decision by another panel on May 5, 1971 in *Kohls, supra*, did not even consider the *Pennington* panel's rationale, and, citing *Supina* and *Stow*, held invalid the delinquency induction order, based on failure to complete a physical examination. The *Kohls* panel cited this Court's *per curiam* decision in *Peet, supra*, probably assuming that this Court had directed, pursuant to *Gutknecht*, the dismissal of any indictment for induction refusal based on a delinquency induction following failure to complete a physical. See *infra*, pp. 16-19. A copy of the *Kohls* decision was attached to appellant's closing brief below. Yet the *per curiam* decision below, *Davis II* (A. 15a), does not even cite, much less discuss, *Kohls* or the implication of *Peet*.

Even more confusing, we respectfully submit, is the notation in the decision below rejecting the petition for rehearing *en banc* that "All active circuit judges of the court have been advised of the suggestion for a rehearing en banc and none has requested it" (A. 16a). See n. 1, *supra*.

tem must be deemed to have followed its own regulations in the processing of registrants for induction. This principle has been especially true in reference to the Selective Service System's compliance with the regulations dealing with the "order of call" for induction, 32 C.F.R. §1631.7 (1969 ed.).[4] See *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968); *United States* v. *Baker*, 416 F.2d 202 (9th Cir. 1969), and cases cited therein. See, also, *United States* v. *Lybrand*, 279 F. Supp. 74 (E.D.N.Y. 1967); *United States* v. *Weintraub*, 429 F.2d 658 (2d Cir. 1970); *cert. den.* 400 U.S. 1014, 1017 (1971) (Douglas, dissenting opinion).

32 C.F.R. §§1642, 1631.7(a) and Local Board Memorandum (LBM) No. 14, ¶3.(c), at SSLR 2160, authorized and directed accelerated induction and removal from the normal order of call for registrants who have transgressed the regulatory requirement to submit to a physical examination.

It is uncontroverted that petitioner was declared delinquent pursuant to 32 C.F.R. §1642 (A. 18a). In light of these facts, and the presumption that a registrant who has been declared delinquent must be presumed to have been accelerated, it rightfully became the Government's burden below to show that the local board did not comply with 32 C.F.R. §1642 and 32 C.F.R. §1631.7(a). *United States* v. *Dobie (I)*, 429 F.2d 32 (4th Cir. 1970); *United States* v. *Thomas*, 422 F.2d 1327, 1328 (9th Cir. 1970) (". . . having classified him delinquent, it must be assumed absent a

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[4] In April of 1970, 32 C.F.R. §1631.7 was amended to provide for a random selection sequence or "lottery" method of induction. Since petitioner's induction was accomplished through the pre-lottery method, all references to the Selective Service Regulations refer to the pre-lottery regulations.

showing to the contrary that the board followed the regulatory command [32 C.F.R. §§1642.13, 1631.7(a)] and accelerated induction . . ."); *Battiste* v. *United States*, 428 F.2d 801 (5th Cir. 1970). See also *United States* v. *Townsend*, 431 F.2d 702 (9th Cir. 1970); *United States* v. *Broyles*, 427 F.2d 358 (9th Cir. 1970); *United States* v. *Stow*, 427 F.2d 891 (9th Cir. 1970); *United States* v. *Supina*, 428 F.2d 1226 (9th Cir. 1970); *United States* v. *McClintock*, 2 SSLR 3685 (N.D. Cal. 1970); *United States* v. *Fink*, —— F. Supp. ——, Cr. No. 42945 (N.D. Cal. Jan. 9, 1970).

The government here failed totally in sustaining its burden.[5] It failed to produce the most crucial evidence in ascertaining a rebuttal of acceleration—the Delivery Lists for calls *after* petitioner's. Nor did the government produce any Notices of Call (SSS Form 201), SSLR 2156:20.2, for calls either before *or* after petitioner's induction so that it might be ascertained, for example, the size of the call on petitioner's board on the delivery date on which he was ordered to report. The government apparently assumed that the proper procedure for disproving a defect in the order of call is by the testimony of the local board clerk.

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[5] The courts below were informed that in *Supina* the Government attempted to make an affirmative factual showing that Supina had not been accelerated, similar to the abortive offer of proof presented by the respondents here in the district court. In a short *per curiam*, the *Supina* panel rejected this attempted offer of proof, thus lending further support to the heavy presumption that registrants declared delinquent are deemed to have been accelerated. For an account of the post-*Supina* confusion, see n. 3, *supra*.

[6] Our analysis of the Government's burden of proof in post-*Gutknecht* cases was fully accepted and carefully explained by the Fourth Circuit in *Dobie*, *supra*. The decision of the court below is so plainly in conflict with *Dobie* (II) that the cryptic statement in the *per curiam*, that "We find *United States* v. *Dobie* (II) . . . distinguishable" is, with respect, simply beyond comprehension.

This is, it is respectfully submitted, incorrect. While the clerk may be called upon to testify as *an element* of proving an order of call violation or acceleration, the proper procedure is the following: First, one must examine the Classification Record, SSS Form 102, required to be kept and maintained by the local board. 32 C.F.R. 1621.6. The "102 Book" lists, year by year, in order of their registration, all of the registrants at a local board. In this case, one would concentrate primarily on the "102 Book" maintained for registrants born in the year 1945. This book would supply the names, dates of birth and classifications on the day petitioner was ordered to report, and other necessary information of at least a large segment of the available manpower pool on the day the induction order was issued to petitioner.

One also needs both the Notice of Call on Local Board (SSS Form 201), SSLR 2156:20.2 (see 32 C.F.R. 1631.7) *and* the Delivery Sheets (SSS Form 261), SSLR 2156:22.1 (see 32 C.F.R. 1632.5) for *all* monthly calls during the year the induction order was issued, both *prior* to the call on which the petitioner was delivered, and, more important in the case of delinquents, the monthly Notices of Call and Delivery Sheets for induction dates *after* the call on which the defendant-registrant was ordered to report. Only after an examination of these records could it be ascertained whether or not men *older* than the petitioner who were, according to the "102 Book," not deferred on the day the induction order in question was issued, may have been called after the defendant as the delinquency and order of call regulations, 1642 and 1631.7(a), would have contemplated. See *United States* v. *Dobie*, 444 F.2d 417 (4th Cir. 1971); *McClintock, supra;* see also *Bradley* v. *Laird*, —— F.2d ——, No. 409-70 (10th Cir. Oct. 28, 1971).

The government was improperly permitted to carry its burden by the bald testimony of a witness who testified to what was clearly no more than her own assumption of non-acceleration[7] (A. 12a-14a), and, as will be shown below, however, the government's own witness conclusively proved petitioner's acceleration by her own testimony.

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[7] A similar effort by the government to prove non-acceleration by the opinion testimony of a local board clerk, and without the necessary documentary support, was expressly held insufficient by the Fourth Circuit in *Dobie* (II). Chief Judge Hoffman of the Eastern District of Virginia, in the remand hearing previously ordered by the Fourth Circuit in *Dobie* (I), 429 F.2d 32, had accepted this testimony as sufficient, and had made findings and conclusions substantially similar to those made by Judge Hauk in this case.

Although there is nothing explicit in the rulings of the courts below, it would appear that to the extent this crucial question was considered at all, the courts acted on some sort of "presumption of regularity" with respect to the availability or non-availability of older men. Any such presumption is clearly in conflict with the Fourth Circuit in *Dobie* (I) and (II), and quite possibly in conflict with the ruling of the Second Circuit in *United States* v. *Weinraub*, 429 F.2d 658, cert. den. 400 U.S. 1014 (1971). The erroneousness of such a presumption is lucidly explained in *United States* v. *McClintock*:

> "Defendant has moved for a judgment of acquittal after his trial for violation of 50 U.S.C. App. §462 (refusal to submit to induction). Defendant argues, *inter alia*, that his induction order was invalid because he was processed as a delinquent. The Government argued, and at an additional hearing, has attempted to prove that the defendant would have been called for induction when he was regardless of the delinquency declaration and therefore that no acceleration occurred. See *United States* v. *Thomas*, [supra] (presumption that a delinquent's induction was accelerated, "absent a showing to the contrary").
>
> Upon consideration of the evidence adduced at the hearing, the Court concludes that the Government did not prove beyond a reasonable doubt that McClintock was not accelerated. The Government did show that other members of defendant's age group had previously been called for induction. *However, the[y] . . . could not show precisely how many men had been called earlier, and how many, not otherwise deferred, remained to be called after the date set for defendant's induction. Without such information it is impossible to come to a certain conclusion regarding acceleration.*" (Emphasis added.) 2 SSLR at 3685.

The clerk testified that men who were both older and younger than petitioner were delivered on the calls prior to petitioner's (A. 21a-29a). The testimony as to these men, however, was irrelevant. By failing to produce the Notices of Call (SSS Form 201), SSLR *supra,* Delivery Sheets (SSS Form 261), SSLR *supra,* and Notices of Call (SSS Form 201), SSLR *supra,* for the monthly calls *after* petitioner's induction, the court was unable to ascertain the crucial question—whether men *older* than petitioner who should have been called *before* him were called *afterwards. United States* v. *Dobie (II), supra.* See also *United States* v. *McClintock, supra.*

This court should grant certiorari to resolve the inter-circuit conflict, and the rule of the Fourth Circuit should be adopted.

D. *Petitioner's Order to Report for Induction as a Delinquent Without a Pre-Induction Physical Examination Was Facially Unlawful. The Decision of the Court Below Is in Conflict With the Decision of the Fifth Circuit in* Battiste v. United States, *428 F.2d 801.*

In *Gutknecht* v. *United States,* 396 U.S. 225 (1970), this Court held that the delinquency regulations were not authorized by Congress. Consequently, local boards were without power to order registrants to report for induction pursuant to those regulations. Petitioner was unarguably ordered to report for induction as a delinquent. He had been declared delinquent for failing to report for a physical examination. Pursuant to 32 C.F.R. §1631.7(a), he was selected and ordered to report for induction notwithstanding that he had not taken a physical examination and thus (1) had not been found acceptable for service in the Armed Forces, and (2) had not been mailed a new

"Statement of Acceptability" (DD Form No. 62) to that effect.[8] For his being declared delinquent, he could not have been ordered to report for induction under then existing regulations[9] without being found acceptable for service and without being mailed a "Statement of Acceptability." Since the delinquency regulations have been declared unauthorized and constitutionally invalid, petitioner's induction order based solely upon his status as a delinquent must also be held to be invalid.

This is the clear holding of the Fifth Circuit in *Battiste* v. *United States, supra*, which stands in sharp conflict with the decisions below.[10] In *Battiste*, the defendant failed to

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[8] As stated at p. 10, *supra*, the only persons who could be inducted without those two prerequisites being met were conscientious objectors, volunteers and delinquents. 32 C.F.R. §1660.20(a) and §1631.7(a). Petitioner was not a volunteer and had not been found by his board to be a conscientious objector. See *United States* v. *Hayden*, 445 F.2d 1365, 1370 (9th Cir. 1971).

[9] Section 1631.7(a) was amended by Executive Order No. 11537, 35 F.R. 9991, of June 18, 1970 to provide that:

> "Notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such a case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined."

This amendment is the simple answer to the fear of Judge Hauk, perhaps shared by the panel below, that the Selective Service System would somehow cease to function if petitioner's argument prevailed.

[10] The decisions below, likewise, appear to be in conflict with the decision of the Third Circuit in *United States* v. *Zmuda*, 423 F.2d 757, 758-759 (1970).

report for a physical examination, was declared delinquent by his local board, and subsequently was ordered to report for induction. Battiste refused to submit to induction and was indicted. The government argued that pursuant to the *Gutknecht* decision, the Fifth Circuit should remand the case to the District Court to determine whether or not Battiste's induction was accelerated. The Fifth Circuit rejected this argument and stated:

> "We must decline to remand this criminal case to allow the government to prove such a tenuous proposition. It is unequivocally clear that the induction order was based not upon the normal sequence of call but upon appellant's delinquency status. The regulations provide that delinquents are to be called first, before non-delinquent draftees and even before volunteers. We think it unlikely that the induction order would have preceded the request for deferment if it had not been based upon appellant's delinquency, since the intervening period was only two months. *But even if this were not so, we would hold the induction order invalid. It is expressly based upon a regulation that the Supreme Court held illegal in Gutknecht, and we cannot nullify the clear holding of that court on the basis of isolated observations in the opinion.*"

428 F.2d at 802. (Emphasis added.)[11]

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[11] Further illustrative of the confusion in the Ninth Circuit are decisions of various panels which appeared to accept this argument, see n. 3, *supra*, as well as decisions of district courts within the Ninth Circuit, *United States* v. *McClintock*, *supra*; *Swartz* v. *United States*, *supra*. Much of the confusion, we respectfully suggest, appears in the decision of the *Pennington* panel, see n. 3, *supra*, which in fashioning its remand rule, unanalytically lumped together cases such as *Broyles*, *supra*, which did arguably involve

The effect of this Court's holding in *Gutknecht* was clear. Upon petitioner's failure to report for a physical examination, the only option open to the local board, prior to the amendment of §1631.7, consistent with the mandate of the statute, was to report him to the United States Attorney for prosecution for *that* violation. *Gutknecht, supra,* at 307. He could not be processed for induction. The order was, consequently, invalid and the indictment should have been dismissed on this ground, separate and apart from the burden of proof question discussed *infra.* By rejecting this argument, the courts below have created an intercircuit conflict which only this Court can resolve. Certiorari should be granted and the *Battiste* rule should be adopted.

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questions of burden of proof, with cases such as *Supina, supra,* and *Thomas, supra,* which involved only the question of the validity of a delinquency induction order based on a failure to attend or complete a physical examination. In any event, the decision below, the most recent Ninth Circuit decision, in addition to throwing into question all of these prior decisions, clearly puts the Ninth Circuit into conflict with the Fifth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this court should consider the appropriateness of remanding to the Court of Appeals for the Ninth Circuit with instructions to rehear the case *en banc*.

Respectfully submitted,

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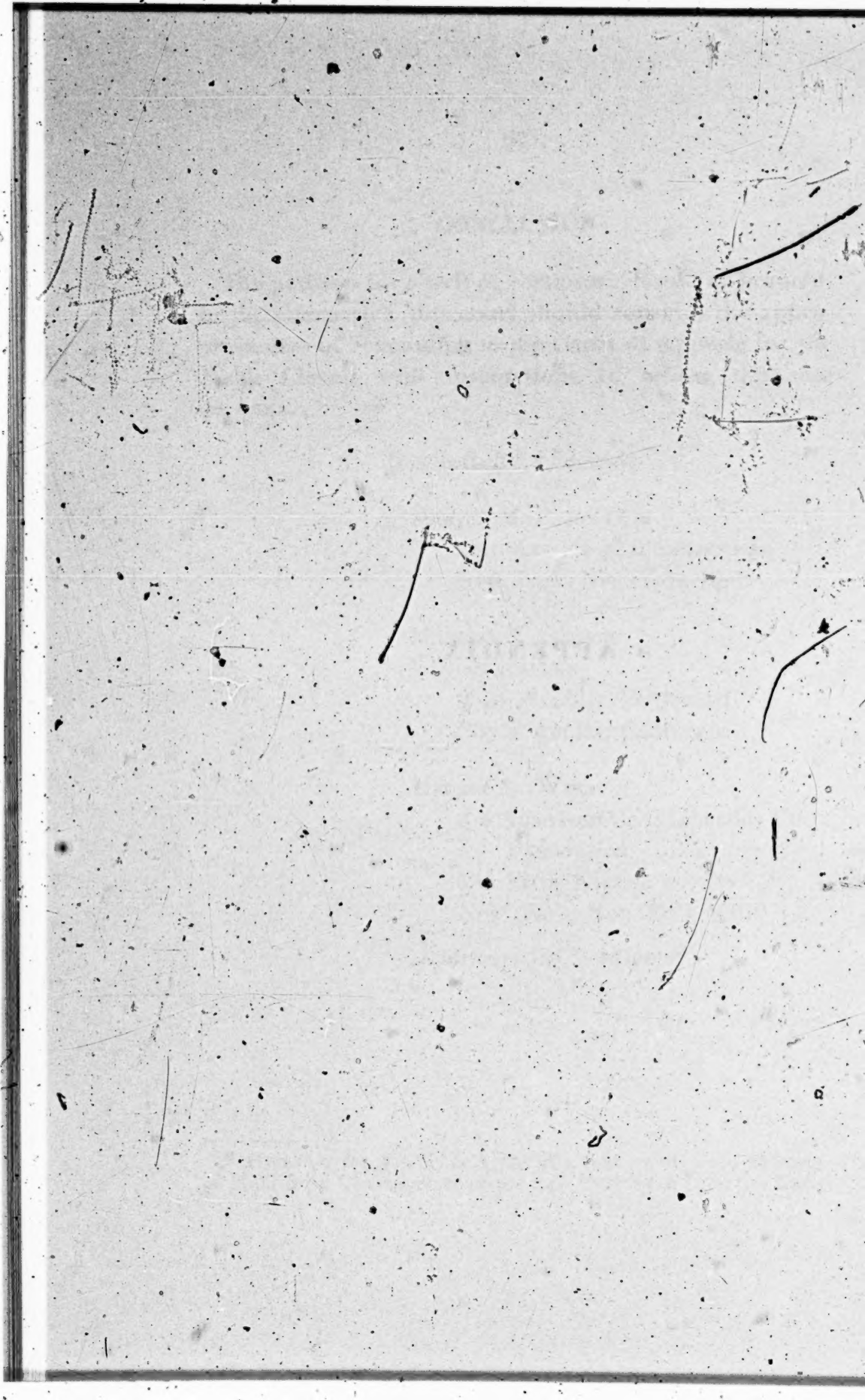
APPENDIX



1st Court of Appeals Opinion
432 F.2d 1009

United States v. Davis, No. 26415 (9th Cir. Nov. 9, 1970)

Per curiam: (Chambers, Wright & Kilkenny, JJ.):

The case is remanded without limitation of scope but especially for consideration of the case in the light of the intervening decision of Gutknecht v. United States, 396 U.S. 295.

The parties may make their issues in district court by appropriate motions of either.

Any new appeal should be expedited.

The present bail order will remain in effect.

Oral Findings of District Court After Remand

* * * * * *

As to Issue No. 1, was there an acceleration of the induction of Mr. Davis contrary to the ruling in Gutknecht vs. United States, Supreme Court case. The facts are, and I so find, that the Defendant Davis was given his order for induction on June 20, 1967. He was ordered to report—the reporting date was given, I should say, as July 11, 1967. That appears at page 47 of Exhibit 1. On that date as of that date when he was given this order for induction there were at least four registrants on the delivery list, or the call list, of November 15, 1966 which had been called—who had been called up with birth dates after the birth date of the defendant; the defendant's birthday being July 6, 1946.

These registrants who were on the call for November 15, 1966 having respectively been born as follows: Jenkins, July 24, 1946, Salkin, November 3, 1946, Sayles, November 25, 1946 and Smith, December 4, 1946—excuse me, they were born after, I should say, after Mr. Davis and were on the call prior to his order for induction before he appeared on the delivery list. Therefore being younger than he with—since they were younger than he, he was in the proper order of call within the regular order of call since he was older than they, and they were upon the order of call earlier than he was. I am referring to Exhibit 2, page 2.

Turning to another exhibit here, Exhibit 3, there were no, as far as we know, and as far as appears, no registrants on that call, March 7, 1967, who were younger than the Defendant Davis.

Turning to Exhibit 4, we find 17 on the regular call of July 11, 1967 which is prior to the defendant's date for or-

der of induction who were on that call for the month of July, 1967 the same date that Mr. Davis was on the call list. as appears on page 1 as a delinquent. He was on the call list as a delinquent. There were at least 17 others on the same call list who had birth dates after or who were therefore younger than Mr. Davis.

I refer to those listed as having been born in 1947 and testified to by Mrs. Krisinger starting with Burke on page 3 of Exhibit 4, and going over to page 4 winding up with Registrant Harding.

Therefore I must necessarily find, in my view, and do so find, that under the facts the Defendant Davis was not ordered up out of the call, the regular call for registrants for induction on the regular delivery list when he was called up. As a matter of fact, there were 17 plus 4—21 others were younger than he who were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration.

Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time, which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require

as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction.

It seems to me—well, I so find that here there was no prejudicial effect upon the substantial rights of Davis. We don't have here, as there were in the Thaxter case, United States vs. Paul Norman Thaxter, Court of Appeals Ninth Circuit No. 25709, January 8, 1971, there was no substantial affectation of his rights by prejudicial result upon any conscientious objector claim as there was in Thaxter. We don't have that here in Davis.

I don't see any other prejudicial effect, because even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact he has not been found acceptable for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service law," and this 1602.4 has not been outlawed either by Gutknecht.

So my conclusions of law on these two issues are that based upon the findings of fact that I have made just now are that No. 1 there is no violation of the strictures of Gutknecht in that there was no acceleration of the kind outlawed by Gutknecht; and secondly, if there was any acceleration of the induction, when I said acceleration I

meant acceleration of induction—I wish the notes to show that. I don't find any acceleration of induction as a matter of law; and secondly, assuming there was acceleration of induction in a technical sense as a matter of law, still there was no affectation prejudicially or adversely of the defendant's substantial rights under the Military Selective Service Act of 1967 or otherwise.

There is no violation of constitutional rights in what was done here by this Draft Board 101.

It is my conclusions buttressed by reasoning that I found in United States vs. Crocker, which I think essentially points up why the court must come to this conclusion. Where you have a defendant, as pointed out in Crocker, and I think we have a situation here, who refuses to report for physical examination, as here and as in Crocker, if we were to follow the line of argument presented by the defense here we would have to say he would then be declared a delinquent. But having been declared a delinquent he could not be ordered for induction because as a delinquent that would "accelerate his induction" and automatically adversely affect his substantial rights. All he would have to do is not report for induction. Then he could be free from ever being prosecuted for failing to report for induction.

Such an argument, it seems to me, would stultify and render negatory and completely unworkable the entire Selective Service System. Every registrant, if he didn't want to go in, could avoid prosecution merely by refusing to take his physical, waiting until he is declared delinquent, called up for induction, even though he is within his age group and probably within the regular call by age. In other words, younger people had already been called before him and at the same time, younger people than he. He could just sit

and refuse to go up on the order for induction after having refused to take the physical and then not be prosecuted on a theory that there was a sort of automatic acceleration that way, an automatic adverse affectation prejudice to his substantial rights.

Now, the most the Ninth Circuit has said in my view is that if there is an acceleration, and they said this in the Thomas case, if there is an acceleration and if the acceleration adversely affects—prejudicially affects the substantial rights of the defendant, then the induction order is void under Gutknecht, and he cannot be convicted. But whereas here there is no acceleration out of the natural and ordinary and regular order of call, whether it be as here in the Davis case under the call by age groups, the oldest first in a given year of birth and the youngest next, and where the defendant has been called up even as a delinquent after others have been put on the call who are younger than he, where we have that situation, and particularly where we don't have any substantial prejudice or adverse effect upon his substantial rights, that is where we don't have the Thaxter situation where the delinquency classification and the order for induction substantially affected his rights—because as pointed out in Thaxter it adversely affected his rights to claim conscientious objector status. Where we don't have those things, it seems to me the Gutknecht decision of the Supreme Court does not require reversal of conviction for failure to report for induction as ordered.

District Court's Findings of Fact and Conclusions of Law After Remand

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 3207-AAH-CD

On Appeal: No. 26415

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

JOSEPH ANTHONY DAVIS,

Defendant.

This matter came before the Honorable A. Andrew Hauk, United States District Judge, on February 2, 1971, for hearing on remand pursuant to order of the Court of Appeals for the Ninth Circuit dated November 9, 1970. During the hearing, the Government presented testimonial evidence and documentary evidence (Exhibits 2, 3, 4 and 5). Arguments were heard on defendant's Motion For Judgment of Acquittal On Remand and the Government's opposition thereto. The Court having heard the oral arguments, testimonial evidence, and having considered the memoranda of counsel and all the files and records of this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Defendant Joseph Anthony Davis is a registrant of Local Board No. 101, Los Angeles, California, having registered on October 4, 1963.

2. Defendant was ordered to report for Physical Examination on October 8, 1965, and, failing to do so, was declared Delinquent on May 4, 1966.

3. Defendant was never mailed a Statement of Acceptability (DD Form 62).

4. On June 20, 1967 defendant was ordered by Local Board 101 to report as a Delinquent for induction on July 11, 1967.

5. There were at least 17 other non-Delinquent registrants of Local Board 101, excluding Volunteers, who were ordered to report for induction on July 11, 1967, on the regular Delivery List and who were younger than defendant.

6. At least 4 non-Delinquent registrants of Local Board 101, who were not Volunteers, and who were younger than defendant, were ordered to report for induction as early as November 15, 1966.

7. Had defendant not been declared Delinquent, he would have been ordered to report for induction on or before November 15, 1966.

8. Had defendant reported as ordered on July 11, 1967, he would have been given a complete physical examination prior to being inducted.

9. To the extent these Findings of Fact also contain Conclusions of Law, they shall be deemed incorporated within the Conclusions of Law.

Conclusions of Law

1. The Delinquency Regulations may not be used to deny a registrant a deferment or exemption or to accelerate his induction.

2. At all times relevant to this case, defendant was properly classified 1-A and was not entitled to any deferments or exemptions.

3. A registrant's induction as a Delinquent is considered "accelerated" within the meaning of *Gutknecht* v. *United States;* 396 U.S. 295 (1970), when he is ordered for induction at a younger age than he would have been had he not been declared a Delinquent. Accordingly, defendant's induction order was not "accelerated."

4. Selective Service Regulation 1631.7 (32 C.F.R. 1631.7) is not unconstitutional on its face and is not unconstitutional as applied to Delinquents except when it is used to accelerate their induction orders.

5. Defendant's substantial rights were not prejudiced by the Local Board's ordering him to report for induction without first giving him a physical examination and sending him a Notice of Acceptability (DD Form 62). The failure to give such an examination and such Notice of Acceptability were caused by defendant's own failure to report for physical examination on October 8, 1965, as

ordered; moreover, he would have received a complete physical examination prior to induction had he reported on July 11, 1967, as ordered.

6. To the extent these Conclusions of Law also contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is ordered:

(1) That the motion of defendant Joseph Anthony Davis for judgment of acquittal be denied; and

(2) That the judgment of conviction heretofore entered is hereby affirmed.

It is further ordered that the foregoing Findings of Fact and Conclusions of Law and this Order be transmitted forthwith to the Court of Appeals for the Ninth Circuit together with the record on appeal and memoranda, transcript and Exhibits of the proceedings on remand.

It is further ordered that the cost of the transcript on remand shall be borne by the Government.

Dated this 16th day of March, 1971.

A. ANDREW HAUK
United States District Judge

Submitted by:

ROBERT L. MEYER
United States Attorney

DAVID R. NISSEN
Assistant United States Attorney
Chief, Criminal Division

ELGIN C. EDWARDS
Assistant United States Attorney

Extract of Testimony in District Court at Hearing on Remand

[Ruth Kissinger, Local Board Secretary]

* * * * *

By Mr. Kallen:

Q. Has it been your experience in the past that a man who has not had a pre-induction physical could be inducted? Speaking of 1967. A. State that again, sir.

Q. If a man did not have a pre-induction physical examination, could he be inducted? A. As a delinquent?

The Court: Or as a volunteer.

The Witness: As a volunteer. Volunteer waives all rights of appeal periods, of physical, they are ordered for physical—ordered for induction without a physical. They are given a physical the day they report for induction.

Q. Mr. Davis was not a volunteer; was he? A. Not at any time.

Q. So aside from him being categorized as delinquent, is it your experience he would have been inducted without his pre-induction physical if he were not classified as a delinquent? A. A delinquent when they are ordered they are given a physical the date they report for induction.

Q. I understand that. What I am asking is had Mr. Davis not been declared a delinquent would he have been inducted without his pre-induction physical? A. Well, no.

The Court: They get the physical before they are inducted?

The Witness: If he had reported for his physical and been determined acceptable, therefore then he would have been on the regular order of call.

The Court: I think what you mean is ordered for induction. That's a different thing from induction.

By Mr. Kallen:

Q. I am sorry, let me rephrase.

Had Mr. Davis not been declared a delinquent, would he have been ordered for induction without his pre-induction physical? A. No, he would not. His acceptability has to be determined to know whether to order him for induction.

Q. In your experience in 1967 a man who did not receive a DD62 Form statement of acceptability would be inducted unless he were delinquent? Would a man who has not received a DD62 Form be inducted— A. There are many factors the way you are stating that. We mail the DD62. If he didn't receive it it wasn't returned to the Local Board—I mean, there are many things that could cover that. I wouldn't flatly say yes or no.

Q. Let me clarify that. If a DD62 had not been sent to a man, would he be ordered for induction if he were not a delinquent? A. What reason would there be for not mailing the DD62?

Q. One possible reason is that he might not take the physical. A. There wouldn't be a DD62 issued. They are issued by the Armed Forced Examining and Induction Station and they are returned to the Local Board. So if

he did not report for induction they could not issue a DD62.

Q. Is it your experience that if a DD62 was not issued a man would be ordered for induction unless he were a delinquent? A. No, he couldn't be—he would be declared delinquent.

Q. Absent any declaration of delinqueney he would not be inducted unless a DD62 had been issued; is that correct?

The Court: Unless he is a volunteer.

Mr. Kallen: I am sorry.

Q. Unless a man were a volunteer and unless a man had been issued or the Armed Forces Examining Station had issued a DD62 Form, would a man be inducted other than a delinquent? A. Other than a delinquent, no.

2nd Court of Appeals Opinion

4 SSLR 3398

United States v. Davis, No. 26,415 (9th Cir. Aug. 12, 1971)

Per curiam (Chambers, Kilkenny & Powell, JJ.):

The judgment of conviction in this selective service case is affirmed.

Davis contends that the implication of Gutknecht v. United States, 396 U.S. 295, and other cases require a finding here that induction was accelerated because of his delinquency. On the record, we think not.

United States v. Davis (9th Cir. 1970), 432 F.2d 1009; Misenhimer v. United States, (9th Cir. July 22, 1971) 71-1384; and United States v. Pennington (9th Cir. 1971), 439 F.2d 145, require affirmance. We find United States v. Dobie (4th Cir., June 28, 1971) #14,236, distinguishable.

The mandate will issue now.

Opinion of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26,415

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

—v.—

JOSEPH ANTHONY DAVIS,

Appellant.

Before:

CHAMBERS and KIRKENNY, *Circuit Judges,*
and POWELL, *District Judge.*

The petition for a rehearing is denied. The suggestion for a rehearing en banc is rejected.

All active circuit judges of the court have been advised of the suggestion for a rehearing en banc and none has requested it.

Selective Service File—Minutes of Action

(Registrant Will Make No Entries on This Page)

Date	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	V	Sec.
[illegible] 1965	[illegible]	[illegible]	[illegible]
[illegible] 3 1965	Form 110 Mailed		
FEB 10 1965	SSS Form 252 mailed for physical on MAR 4 1965		
[illegible]	SSS Form 223 and 3-17-65 memo mailed to report for phy		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]

18a

Selective Service File—Delinquency Notice

SELECTIVE SERVICE SYSTEM

DELINQUENCY NOTICE

May 4, 1966
(Date Became Delinquent)

May 4, 1966
(Date of Mailing)

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE NO.			
4	101	46	828

To Joseph (First) Anthony (Middle) Davis (Last)

Address 3781½ Menlo
(Street and Number or R.F.D. Route)

Los Angeles (City, Town, or Village) L.A. (County) California (State)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Forces Physical Examination Oct. 8, 1965.
Failed to keep Local Board informed of current address.

BEST AVAILABLE COPY

2. You are hereby directed to report to this local board immediately, either in person or by mail.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment.

39

(Signature of Local Board)

Selective Service File—1st Order to Report for Induction

Appeal Not Required.

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

RECEIVED
LOCAL BOARD GROUP "C"
FEB 23 1967

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(LOCAL BOARD STAMP)

The President of the United States,

To

[illegible] Anthony Davis
3731½ Wellington Avenue
Los Angeles, California 90007

1301 WESTWOOD BLVD
LOS ANGELES, CALIF. 90024

February 23, 1967
(Date of mailing)

1-A

SELECTIVE SERVICE NO.			
4	10	46	328

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report
L.A. EXAMINING AND INDUCTION STATION
1039 S. Broadway, Los Angeles, Calif.
(Place of reporting)

on MAR 7 1967 (Date) at 7:30 A.M. (Hour)

for forwarding to an Armed Forces Induction Station.

E. M. Bostick
(Member or clerk of Local Board)

IMPORTANT NOTICE

(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Your documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to make the following with you when reporting to the induction station. The documents will be returned to you. (a) For LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough civilian clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Order does not furnish transportation, but meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any unnecessary loss if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to obtain your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship,

BEST AVAILABLE COPY

Selective Service File—2nd Order to Report for Induction

SELECTIVE SERVICE SYSTEM

Approval not required

ORDER TO REPORT FOR INDUCTION

DELINQUENT

Local Board No. 101
Los Angeles County
1601 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

June 20, 1967
(Date of mailing)

SELECTIVE SERVICE NO.			
4	101	46	828

The President of the United States,

To

Joseph Anthony Davis
868 Carrol Avenue
St. Paul, Minnesota

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

U.S. Examining and Entrance Station
1033 S. Broadway, Los Angeles, Calif.
(Place of reporting)

on July 11, 1967 (Date) at 7:30 A. M. (Hour)

for forwarding to an Armed Forces Induction Station.

W. M. Bishop (Member or Clerk of Local Board)

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate; or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified copy of orders of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavit establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order

47

SSS Form 252 (Revised 4-20-48) (Previous printings may be used until exhausted.) U.S. GOVERNMENT PRINTING OFFICE

November 1966 Delivery Lists

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024

(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Approval not required

Sheet No. 1 of 2 sheets

November 15, 1966
(Date of delivery)

Call No. 197

Induction period November, 1966
(Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on Nov. 15, 1966 (Date) by Private carrier (Name of carrier) to report to you for induction.

Number called for	22	Number listed on transfer in	18
Number listed from this board	21	Total number forwarded	18

	(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Initial)	(3) Not Physically Fit To Qualify	(4) DISPOSITION: Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Passed To Reserve	Held Over	(5) REMARKS
1	V4	102	48	113	WAYNE,	Michael	D.		X							
2	V4	101	47	1100	HALLIDE,	Harry	L.							X		
3	4	101	42	583	HEEMAN,	William	H.							X		Enl
4	4	101	43	236	RUDOLTZ,	Ronald	N.		X							
5	4	101	43	406	HROSE,	Gary	S.		X							
6	4	101	44	102	GORDON,	Willard	W.							X		Canceled
7	4	101	44	281	POLLARD, JR.	Julius	-							X		Postponed Ltr.
8	4	101	44	334	WEBB,	James	J.							X		Postponement
9	4	101	44	856	TOWNE,	Jeffrey	R.		X							Postponement received
10	4	101	44	870	TAM,	Ray	Y.		X							
11	4	101	45	111	PEARL,	Stuart	A.		X							
12	4	101	45	303	JACOBS,	Joseph	-							X		PHYSICAL FAILED
13	4	101	45	496	ICHINOTSUBO,	Howard	T.		X							
14	4	101	45	811	WALKER,	Charles	E.									Postponed
15	4	101	46	116	WARD,	Ronald	J.									CONVICTED CIVIL OFFENCE WAIVER ACTION

Totals (Enter on last sheet only)

Camille W. Chapman
(Signature of clerk or member of local board)

Oct. 28, 1966
(Date of preparation)

(Signature of C. O. AFIS)

(Grade and organization)

23 NOV 1966
(Date of return to local board)

November 1966 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024

(Local Board Stamp)

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONTINUATION SHEET
(Prepare in Quintuplicate)

Approval not required

Sheet No. 2 of 2 sheets

November 15, 1966
(Date of Delivery)

(1) SELECTIVE SERVICE NO.	(2) NAME (Last) (First) (Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION — Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4 101 46 259	WILLIAMS, Gregory D.							X		Cancelled
4 101 46 263	MORRIS, John H.		X							
4 101 46 546	JENKINS, Willie Lee									Postponed
4 101 46 738	SEAKIN, Richard I.									Cancelled
4 101 46 788	SAYLES, General A.		X							
4 101 46 835	SMITH, Leonard							X		XX – Re-type PHYSICAL REJECT

Totals (Enter on last sheet only)

Emilie W. Chapman
Emilie W. Chapman (Signature of clerk or member of local board)

Oct. 28, 1966
(Date of preparation)

NSS Form No. 281-A (Revised 8-22-66)

(Signature of C. O. A. [illegible])
J. JAMES
2 LT. USAF
(Grade and organization)

23 NOV 1966
(Date of return to local board)

BEST AVAILABLE COPY

March 1967 Delivery Lists

Local Board No. 101
Los Angeles County
[illegible] Blvd.
[illegible], Calif. 90024

(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 1 Sheets

March 7, 1967
(Date of delivery)

Call No. Supplemental 201

Induction period March
(Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on March 7, 1967 (Date) by private carrier (Name of carrier) to report to you for induction.

Number called for	
Number listed from this board	4
Number listed on transfer in	
Total number forwarded	4

	(1) SELECTIVE SERVICE NO.	(2) ORDERED FOR INDUCTION AS INDICATED REGISTRANT'S NAME (Last) (First) (Middle Initial)	(3) NOT PHYSICALLY FOUND QUALIFIED	(4) DISPOSITION: INDUCTED: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
1	4 101 46 828	DAVIS, Joseph A.							X		out to date
2	4 101 47 295	[illegible] Joey Jo						X			PHYSICAL REJ. [illegible]
3	4 101 47 454	DAVIS, Donald E.							X		out to date
4	4 101 47 615	MILLIKAN, Craig S.									Walkout
5											
6											
7											
8											
9											
10											
11											
12											
13											
14											
15											

RECEIVED
LOCAL BOARD GROUP "C"
MAR 14 1967
1301 WESTWOOD BLVD.
LOS ANGELES, CALIF. 90024

Totals (Enter on last sheet only)

[signature] (Signature of clerk or member of local board) Chapman

Emilie M. [illegible]

February 21, 1967
(Date of preparation)

[signature] (Signature of C. O. AFIS)

[illegible] (Grade and organization)

13 MAR 1967
(Date of return to local board)

SSS Form No. 201 (Revised 6-22-66)
(Printing of 6-15-66 may be used)

March 1967 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
8401 Westwood Blvd.
Los Angeles, Calif., 90024

(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 1 sheets
(Number not required.)

March 7 1967
(Date of delivery)

Call No. 201

Induction period March 1967
(Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on March 7 1967 (Date) by Private Carrier (Name of carrier) to report to you for induction.

Number called for	30	Number listed on transfer in	
Number listed from this board	31	Total number forwarded	18

(1) SELECTIVE SERVICE NO.	(2) NAME (Last) (First) (Middle Initial)	(3) Not Previously Found Acceptable	(4) DISPOSITION: Inducted: Army	Navy	Air Force	Marine Corps	Coast Guard	Failed To Report	Withdrawn	(5) REMARKS
V1 4 101 47 862	MC GIROY, Tyrone		X							
V2 4 101 47 927	JIMERSON, Michael		X							
3 4 101 43 681	JIMERSONS, William									Postponed
4 4 101 43 681	CLARK, Frederick S.		X							
5 4 101 43 929	MYERS, Herman C.									Postponed
6 4 101 44 54	NEWMAN, John		X							
7 4 101 44 382	KAPLAN, Harvey							X		sent 304 Postponed copy
8 4 101 44 503	LEVKIND, Peter		X							
9 4 101 44 588	KAWAMOTO, Tomotyuki									Postponed
10 4 101 44 719	DICKENS, Barry J.									POSTPONED
11 4 101 45 210	HOLMES, Von E.							X		
12 4 101 45 270	SILBERT, Stanley M.									Postponed
13 4 101 45 306	CASTANEDA, JR., Anthony -									Postponed
14 4 101 45 495	ROBBINS, Gary J.		X							
15 4 101 45 830	DAVIS, Ronald C.									Postponed
Totals (Enter on last sheet only)										

RECEIVED
LOCAL BOARD NO. 101

Carlie W. Chapman
(Signature of clerk or member of local board)

February 21 1967
(Date of preparation)

MAR 14 1967

J. JAMES
(Signature of C. O. Aide)

1301 Westwood Blvd. USAF
Los Angeles, Calif. 90024
(Grade and organization)

13 March 1967
(Date of return to local board)

SSS Form No. 261 Revised 6-29-61
(Printing of 6-10-52 may be used)

BEST AVAILABLE COPY

March 1967 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONTINUATION SHEET
(Prepare in Quintuplicate)

Sheet No. 2 of 2 sheets

March 7 1967
(Date of Delivery)

(1) SELECTIVE SERVICE NO.	(2) NAME (Last) (First) (Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION: Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4 101 45 848	SHAW, Artie L.		X							
4 101 45 863	SEAWELL, Joseph N.		X							
4 101 46 39	BRUCKER, Earl W.									POSTPONED 1-A(S)
4 101 46 56	ROSE, Steven R.									POSTPONED Prev. Postponed
4 101 46 313	WASHINGTON, Ronald E.									Postponed
4 101 46 316	FREUNDLICH, John S.									Postponed
4 101 46 355	OWENS, Rodney B.									POSTPONED
4 101 46 360	PORT, Weldon J.							X		4-F Govt.
4 101 46 495	ROTH, John L.						X			PHYSICAL REJECT YX — Notice 9-67
4 101 46 600	PARENO, David E.									Postponed
4 101 46 523	MARSUND, Bruce									Postponed
4 101 46 526	NANAKA, Raymond K.		X							
4 101 46 715	BEVERLY, Daniel W.		X							
4 101 46 903	WEBSTER, Leon									Postponed
4 101 46 913	GREENE, JR. Milton L.							X		4-F
4 101 46 1028	WAGNER, Jack -									POSTPONED

Totals (Enter on last sheet only)

RECEIVED
LOCAL BOARD 101
MAR 14 1967

Phillie M. Chapman
(Typed name and signature of clerk or member of local board)

February 21 1967
(Date of preparation)

1301 Westwood Blvd.
Los Angeles, Calif. 90024

J. JAMES
(Typed name of person making delivery)

U.S.A.
(Grade and organization)

13 MAR 1967
(Date of return to local board)

NSS Forms No. 301-A (Revised 5-22-64)

U.S. GOVERNMENT PRINTING OFFICE: 1966 O—876884

July 1967 Delivery Lists

Local Board No 101
Los Angeles County
1301 Westwood Blvd
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

DELINQUENTS

Approval not required.

Sheet No. 1 of 1 sheets

July 11, 1967
(Date of delivery)

Call No. 205

Induction period July 1967
(Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on 7-11-67 (Date) by Private Carrier (Name of carrier) to report to you for induction.

Number called for	
Number listed from this board	3
Number listed on transfer in	
Total number forwarded	3

	(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
1	4	101	46	828	DAVIS,	JOSEPH	A.	X						X		
2	4	101	47	248	ROSS,	RICHARD	A.						X			PHYSICAL REJECT YXX Re-exam Sight Bre for X
3	4	101	47	771	ESPORLES,	ELIAS	-	X						X		
4																
5																
6																
7																
8																
9																
10																
11																
12																
13																
14																
15																
					Totals (Enter on last sheet only)											

RECEIVED
LOCAL BOARD GROUP "C"
JUL 20 1967
1301 Westwood Boulevard
Los Angeles, Calif. 90024

Emilie W. Chapman (Signature of clerk of local board)
June 20, 1967
(Date of preparation)

LELAND J. SPLEDGER C. O. AFIS
2LT, ACC
(Grade and organization)
19 JUL 1967
(Date of return to local board)

SSS Form No. 261 (Revised 8-29-66)
(Printing of 8-13-66 may be used)

BEST AVAILABLE COPY

July 1967 Delivery Lists—*Continued*

Local board No. 101
Los Angeles County
1301 Westwood Blvd
Los Angeles, Calif. 90024

(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 3 sheets

Approval not required.

July 11, 1967
(Date of delivery)

Call No. 205

Induction period _____ (Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on 7-11-67 (Date) by Private Carrier (Name of carrier) to report to you for induction.

Number called for	46	Number listed on transfer in	
Number listed from this board	46	Total number forwarded	38

	(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION: Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
V 1	4	101	41	542	SOBOL,	BRUCE	I.	✓	X							
V 2	4	101	45	226	BARBER, JR.	LEO	-	✓						X		Enl.
V 3	4	101	48	520	MARTINEZ, JR.	THOMAS	-	✓	X							
4	4	101	42	247	ITO,	TAKESHI	R.	✓	X							
5	4	101	42	577	MITTELBACH,	GARY	C.	✓					X			PHYSICAL REJECT XX 7/67 Prev. Postponed
6	4	101	42	608	LEE,	WILLIAM	J.	✓					X			XX PHYSICAL REJECT 7/68
7	4	101	42	705	SCOTT,	ROBERT	D.	✓					X			PHYSICAL REJECT Prev. Postponed 7/68 XX
8	4	101	43	51	BARDWELL,	JOHN	C.									Postponed
9	4	101	43	412	CHALFIN,	MAX	L.									Cancelled
10	4	101	43	567	STANDARD,	ROBERT										Postponed
11	4	101	45	218	DURHAM,	MICHAEL										Cancelled
12	4	101	45	453	MERCHASIN,	PAUL										Postponed
13	4	101	45	538	KAUMAN,	MICHAEL	A.									Postponed
14	4	101	45	735	WERTKIN,	STUART	S.	✓	X							
15	4	101	45	743	KOSBERG,	MICHAEL	I.									Postponed

RECEIVED
LOCAL BOARD GROUP "C"
JUL 20 1967
1301 Westwood Boulevard
Los Angeles, Calif. 90024

Totals (Enter on last sheet only)

Emilie W. Chapman
Emilie W. Chapman (Signature of clerk or member of local board)

June 23, 1967
(Date of preparation)

J. Pledger
(Signature of C. O. AFIS)

LELAND J. PLEDGER
2LT, AGC
(Grade and organization)

19 JUL 1967
(Date of return to local board)

Form No. 261 (Revised 9-29-48)
(Jng of 8-1-48 may be used)

July 1967 Delivery Lists—*Continued*

Local Board No 101
Los Angeles County
1301 Westwood Blvd
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONTINUATION SHEET
(Prepare In Quintuplicate)

Approval not required.

Sheet No. 2 of 3 sheets

July 11, 1967
(Date of Delivery)

(1) SELECTIVE SERVICE NO.	(2) NAME (Last)	(First)	(Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4 101 45 759	JONES,	ALLEN	O.	✓								Cancelled
4 101 46 199	REDMOND,	WAYNE	E.	✓	X							
4 101 46 242	SHAW,	DAVID	E.	✓	X							
4 101 46 863	RICE,	HARVEY	J.	✓								Cancelled
4 101 47 105	BURKE,	RONALD	L.	✓								Cancelled
4 101 47 122	YOUNGMAN,	HARVEY	-	✓						X		Enl
4 101 47 125	MIZRAHI,	DAVID	-	✓								AU PENDING CIVIL OFFENSE WAIVER ACTION 1-A-O
4 101 47 128	ASATO,	KENNETH	N.	✓	X							
4 101 47 173	PENA,	JOSE	-	✓	X					X		Ltr to Exam Bd Medical Griffis 2-A to 7/68
4 101 47 261	WALDEN, JR.	HUBERT	W.							X		
4 101 47 299	MASUDA,	MORRIS	S.	✓	X							
4 101 47 328	HARDIN,	ROGER	K.	✓						X		Enl
4 101 47 338	NUKES,	GREGORY	C.	✓								Postponed
4 101 47 350	McFRAZIER,	JOHNNY	R.	✓						X		Enl
4 101 47 379	CROWLEY,	OLLIE	C.	✓						X		Enl
4 101 47 424	PALMER,	DAVID		✓								Postponed
4 101 47 467	KIDD,	RONALD	E.	✓	X							
4 101 47 486	FUTANI,	GEORGE	H.	✓	X							

RECEIVED
LOCAL BOARD GROUP "C"
JUL 20 1967
1301 Westwood Boulevard
Los Angeles, Calif. 90024

Totals (Enter on last sheet only)

Erullie W. Chapman
Erullie W. Chapman (Signature of clerk or member of local board)
June 23, 1967
(Date of preparation)

NSH Form No. 881-A (Revised 8-22-60)

U.S. GOVERNMENT PRINTING OFFICE : 1960 O—579594

LELAND J. PLEDGER,
(Signature of C. O. Advisor)
2LT, AGC
(Organization)
19 JUL 1967
(Date of return to local board)

BEST AVAILABLE COPY

July 1967 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1360 Westwood Blvd
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONTINUATION SHEET
(Prepare in Quintuplicate)

Approval not required.

Sheet No. 3 of 3 sheets

July 11, 1967
(Date of Delivery)

(1) SELECTIVE SERVICE NO.	(2) NAME (Last) (First) (Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION: Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4 101 47 516	ECHEVERRIA, HERMAN R.	X						X		
4 101 47 539	JOHNSON, OTIS		X							
4 101 47 547	VEGA, ROBERT		X							
4 101 47 562	MATSUDA, MASAYU R.		X							
4 101 47 574	WYCOFF, STEVE G.		X							AU PENDING CIVIL OFFENSE WAIVER ACTION Rec
4 101 47 586	CHASE, JAMES D.							X		Enl
4 101 47 589	NELSON, ALLEN J.									Cancelled
4 101 47 602	HAYDOCK, HERBERT M.						X			XX — Rec'd from 10/67 PHYSICAL REJECT
4 101 47 607	GUMPEL, STEPHEN P.							X		Enl
4 101 47 614	SCHWARTZ, HOWARD L.									Postponed
4 101 47 629	CHRISTOPHER, JR. ODELL		X							
4 101 47 630	FALKNER, MICHAEL A.		X							
4 101 47 643	HARDING, JEROME L.		X							

RECEIVED
LOCAL BOARD NO. 101
JUL 20 1967
1301 Westwood Blvd
Los Angeles, Calif. 90025

Totals (Enter on last sheet only)

Emilie W. Chapman
(Signature of clerk or member of local board)
Emilie W. Chapman

June 23, 1967
(Date of preparation)

LELAND J. [illegible] ROGER, U.S. AFIS)
2LT, AGC
(Grade and organization)

19 JUL 1967
(Date of return to local board)

SSS Form No. 261-A (Revised 8-22-66)

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No. 71-661

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-661

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of failing to report for induction, in violation of 50 U.S.C. App. 462, and sentenced to three years' imprisonment. The court of appeals remanded the case to the district court "without limitation of scope but especially for consideration of * * * the intervening decision of Gutknecht v. United States, 396 U.S. 295" (Pet. App. 1a). Following a hearing, the district court affirmed the earlier convic-

453-401—71

tion (Pet. App. 7a–11a), and the court of appeals affirmed *per curiam* (Pet. App. 15a).[1]

1. The essential facts are not in dispute. On October 4, 1963, petitioner registered with his local draft board in Los Angeles, California. He was classified I–A on February 3, 1965. On February 16, 1965, he was ordered to report for a physical examination on March 4, 1965. Petitioner failed to comply with that order. (Pet. 2–3.)

On September 19, 1965, petitioner was again ordered to report for a physical on October 8, 1965, and again he failed to report. On December 6, 1965, the board mailed to two addresses that petitioner had given it a "Delinquency Warning" (Cal. SSS Form 304). The notices were returned marked "addressee unknown"; the board mailed another set, which were also returned. Thereafter, petitioner was declared delinquent for failing to report for the October 8 physical and to advise the board of his current address, and a notice to this effect was mailed to him on May 4, 1966. (Pet. 3–4; Pet. App. 17a–18a.)

On February 21, 1967, petitioner was ordered to report for induction on March 7, 1967. This notice was returned undelivered on February 23, 1967, and petitioner did not report for induction as ordered. The board, acting on the advice of the State Director, on June 20, 1967, mailed a second order to report for induction to a third address that petitioner had given

[1] On November 27, 1971, Mr. Justice Douglas granted petitioner's application for bail pending disposition of the petition for a writ of certiorari.

it, in St. Paul, Minnesota. Though this notice was not returned, petitioner failed to report for induction on the prescribed date (July 11, 1967). The present indictment and conviction followed. (Pet. 4: Pet. App. 19a–20a.)

On remand after the first appeal, the district court conducted a hearing, at which the government presented the local board's "delivery lists" for pertinent dates (see Pet. App. 21a–29a), and the board's executive secretary testified that petitioner's induction had not been accelerated by reason of his delinquency. The district court found that petitioner would have been ordered to report for induction long before the date on which he finally was ordered, but failed, to report (July 11, 1967), if he had complied with the board's procedures and not been declared a delinquent (Pet. App. 8a). Therefore, the court reasoned, petitioner had not been ordered for induction at a younger age than he would have been had he not been declared delinquent, and accordingly his induction was not improperly accelerated under *Gutknecht* (Pet. App. 9a). The court concluded further that the induction order without a pre-induction physical and finding of acceptability did not prejudice petitioner's substantial rights, since he would have received a physical examination and been found acceptable prior to induction if he had reported as ordered (*ibid.*). On the basis of these findings and conclusions, the court affirmed the conviction (Pet. App. 10a). The court of appeals affirmed *per curiam* (Pet. App. 15a), and denied a

petition for rehearing and suggestion for rehearing en banc (Pet. App. 16a).

2. Petitioner asserts that his order of induction was unlawful because it was issued after he had been declared delinquent, in violation of the principles enunciated in *Gutknecht* v. *United States*, 396 U.S. 295, and because it was not preceded by a pre-induction physical examination. Neither claim has merit.

a. In *Gutknecht*, this Court held that local boards cannot declare a registrant delinquent for the purpose of accelerating his induction out of turn, as a punitive sanction for his failure to comply with Selective Service rules and regulations. The Court did not, however, forbid local boards from declaring delinquent registrants, like petitioner, who fail to report for a physical examination as ordered, nor did it proscribe the prosecution of such registrants for refusing to report for induction pursuant to a subsequent induction order, when there has been no attempt to punish them by accelerating their induction out of turn.

In the present case, the district court found, after the hearing on remand, that petitioner's induction was not accelerated as a result of his being declared delinquent, but, to the contrary, was substantially delayed because of the delinquency declaration (see Pet. App. 8a). On the basis of its findings, the court correctly concluded that *Gutknecht* is not applicable, and that petitioner's induction order was not unlawful under that case.

We do not understand petitioner to challenge the court's legal conclusions. Instead, his contention is

that when a delinquency declaration has occurred, the government must show that it did not accelerate the registrant's induction, and that despite the district court's findings that petitioner's induction was not accelerated, "[t]he government here failed totally in sustaining its burden" (Pet. 13). This question necessarily turns on the particular facts presented, and thus does not warrant plenary review by this Court; in any event, the rulings by the courts below were correct.

There is, we submit, ample support in the record for the district court's findings that petitioner's induction was not accelerated because he was declared delinquent. The court considered not only testimony to this effect from the board's secretary, but also had before it the delivery lists for dates pertinent to petitioner's induction order. This evidence showed that 21 registrants younger than petitioner, and in the same classification for induction purposes as he was, received orders to report for induction on or before the date prescribed by his order (see Pet. App. 2a–3a, 8a). From this, the court properly inferred that petitioner would have been ordered to report for induction before he actually was, but for his delinquent status, and that the delinquency delayed, rather than accelerated, his induction.

Though petitioner claims that other types of evidence would have been more appropriate (Pet. 13–14), he did not introduce any such other evidence or attempt to rebut the government's proof. We agree that the kind of evidence that petitioner suggests might

be helpful in some cases. But this does not mean, as petitioner apparently would have this Court hold, that the government can show the absence of acceleration only through such evidence. On the basis of relevant and substantial evidence of no acceleration, the district court properly held that the government met its burden of proof on this issue; certainly its decision in this respect was not clearly erroneous. Compare *Misenhimer* v. *United States*, C.A. 9, No. 71–1384, decided July 22, 1971, certiorari denied, No. 71–5330, November 22, 1971.

Contrary to petitioner's contention, the decision below does not conflict with *United States* v. *Dobie*, 444 F. 2d 417 (C.A. 4). The holding in *Dobie* that the government failed to show during the remand hearing in that case that no acceleration occurred turned on the particular facts, and the circumstances in which Registrant Dobie was ordered to report for induction are significantly different from those here. Unlike petitioner, Dobie had a deferment before he was declared delinquent, and, if he had reported as ordered, it was "equally probable" that he would not have been inducted, but instead deferred (444 F. 2d at 421). And the delivery lists introduced in *Dobie* involved only periods prior to Dobie's order, whereas the lists here included the list on which petitioner's induction order was based, for July 1967 (see Pet. App. 26a–29a).

b. Nor was petitioner's induction order unlawful because he was not given a pre-induction physical examination and found acceptable before that order issued.

Petitioner correctly points out (Pet. 16–17) that regulations applicable when petitioner was ordered to report permitted local boards to issue induction orders to delinquents without a prior pre-induction physical and statement of acceptability, and that petitioner received his order pursuant to those regulations (see 32 C.F.R. 1631.7(a)). But it does not follow, as petitioner asserts, that his order was unlawful under *Gutknecht*. That case did not involve Section 1631.7(a), the regulation challenged here, but instead the delinquency regulations themselves (32 C.F.R. pt. 1642). Section 1631.7(a), moreover, does not authorize delinquency status, but merely permits the board to order delinquents, along with certain others, to report for induction without first receiving a physical and acceptance notice. Thus, an induction order pursuant to this section would not indicate whether the induction thereunder was wrongly accelerated, the only concern in the *Gutknecht* decision.

The procedures under Section 1631.7(a) were essential to the induction process, since, by reason of petitioner's repeated refusals to report, his local board could not provide a pre-induction physical and acceptance notice. These procedures clearly did not prejudice petitioner, in view of the fact that he would have received a physical and been found acceptable prior to induction if he had reported as ordered. The rejection of petitioner's claims on this issue by the courts below was correct.

We think that *Battiste* v. *United States*, 428 F. 2d 801 (C.A. 5), which petitioner contends conflicts with

the decision below, stands only for the proposition that an induction order is invalid where the record makes it "unequivocally clear that the induction order was based not upon the normal sequence of call but upon appellant's delinquency status" (428 F. 2d at 802). As we set out above, the record in the present case shows that petitioner's induction order was not altered in the only sense relevant under *Gutknecht*, by accelerating it ahead of its normal sequence. Neither *Gutknecht* nor *Battiste* applies to this situation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1971

PETITIONERS'

REPLY

MEMORANDUM

SUPREME COURT, U. S.

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Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Solicitor-General's short memorandum in opposition, in attempting to defend the decision below, appears to place the Government in direct contradiction to this Court's holding in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), and the post-*Gutknecht* decisions of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971), the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801 (1970) and apparently the Ninth Circuit itself in *United States* v. *Kohls*, 441 F.2d 1076 (1971). Moreover, in its effort to persuade this Court that the decision below does not pose such a conflict, the Government's memorandum misreads *Dobie* and *Battiste*.

1. The government's initial contention[1] that plenary review of the issues tendered by this important case are un-

[1] Page 5, Memorandum in Opposition (hereinafter "Mem. Op.").

necessary, because the questions presented turn only "on the particular facts" of this case, demonstrates a fundamental misunderstanding of both the questions presented and their far reaching importance.

At issue here are the questions of (1) what quantum and method of proof the government must meet in attempting to secure criminal convictions for failing to report for induction when the evidence *prima facie* indicates[2] that the defendant's induction order was issued in violation of *Gutknecht* v. *United States, supra;* and (2) where the induction order was concededly[3] issued in conformity with and in furtherance of a separate portion of the Selective Service delinquency scheme[4] implicitly invalidated in *Gutknecht,* whether such an order is *per se* invalid. These issues have proved elusive to the Ninth Circuit itself[5] (see

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[2] In the instant case petitioner was declared delinquent (A. 18a) (all references "A" refer to the appendix to the Petition for Certiorari); was listed on a separate delivery list for delinquent inductees (A. 23a, 26a), see Local Board Memorandum 14, ¶5.(b), SSLR 2160, 2161, *United States* v. *Bruce,* 4 SSLR 3508 (4th Cir. 1971); was issued a "Delinquent" induction order (A. 19a, 20a); was not given (as was conceded) a pre-induction physical examination nor issued a DD Form 62, "Statement of Acceptability," see *United States* v. *McClintock,* 2 SSLR 3685 (N.D. Cal. 1970); *Kohls, supra.* No proof was offered at trial by introduction of the "Classification Record," see 32 C.F.R. §1621.6, that registrants *older* than petitioner were not called after him. See *Dobie, supra* at 420.

[3] "Petitioner correctly points out (Pet. 16-17) that regulations applicable when petitioner was ordered to report permitted local boards to issue induction orders to delinquents without a prior pre-induction physical and statement of acceptability, and that petitioner received his orders pursuant to those regulations . . ." (p. 7, Mem. Op.).

[4] 32 C.F.R. §1631.7(a)(1), §1642 (1969).

[5] The Solicitor-General's memorandum does not even attempt to rebut the contentions in the petition that there is an apparently continuing inconsistency on these questions among various panels of the Ninth Circuit.

cases cited at pp. 8 and 11, n. 3, Pet.) and have caused a clear and irreconcilable conflict between the circuits. See *United States* v. *Bruce*, 4 SSLR 3508 (4th Cir. 1971); *Dobie, supra; United States* v. *Corely*, 4 SSLR 3491 (D. S. Car. 1971).

Initially, the government ambiguously characterizes the documents it utilized to attempt to sustain its burden as "pertinent." (P. 5, Mem. Op.) At best, they were only marginally so, for, as we stated in our petition at pp. 13-15, the most crucial documents--delivery lists for calls *after* petitioner's were not produced, nor was the "Classification Record," SSS Form 102. We submit that *any* conviction so based on a finding of non-acceleration is patently violative of due process because it is factually unsupportable as a matter of law. Cf. *Thompson* v. *Louisville*, 362 U.S. 199 (1960). Petitioner submits that the only conclusive manner of proving that no "de facto"[6] acceleration occurred is by the method which we described in our petition and which the Fourth Circuit has adopted. While conceding that "the kind of evidence that petitioner suggests might be helpful"[7] in cases of this type, the government unabashedly chides *petitioner* for not producing it *himself* despite the fact that it was clearly the government's burden of proof upon remand. See e.g. *United States* v. *Dobie (I)*, 429 F.2d 32, 33 (4th Cir. 1970); *United States* v. *Thomas*, 422 F.2d 1327, 1328 (9th Cir. 1970).[8]

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[6] As opposed to "de jure" acceleration. See Sec. 2, pp. 5-7 *infra*.

[7] Pp. 5-6, Mem. Op.

[8] The assertion, propounded by the district court on the basis of the executive secretary's outrageously contradictory and plainly incredible testimony, and here parroted (p. 5 Mem. Op.) by the government, that petitioner's induction was "delayed" by the delin-

The government's conceptual inability to answer the issues presented in the petition for certiorari is directly attributable to a jaundiced reading of *Gutknecht, supra,* as somehow not finally placing to rest a ". . . monster which rule[d] no practical limits upon its discretion."[9] To have reasoned (Mem. Op. p. 3)—or, more accurately, speculated, cf. *Dickinson* v. *United States,* 346 U.S. 389, 397 (1953)—that petitioner "had not been ordered for induction at a younger age than he would have been had he not been declared delinquent" (Mem. Op., p. 3) is not the issue. The critical question is whether he was ordered for induction unlawfully, while there were other registrants, older than he, who were available for induction. An unlawful delinquency induction order, issued to a registrant out of his proper turn, is plainly not legitimized by judicial speculation that it was no more unlawful than out-of-turn orders issued to other registrants of the same age. Thus, the Solicitor-General contends in the face of the most direct authority to the contrary that this Court "did not . . . forbid local boards from declaring delinquent registrants, like petitioner, . . ." (p. 4, Mem. Op.). Clearly, that is exactly what this Court

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quency proceedings themselves, is obvious bootstrapping when seen in the light of the finding of non-acceleration itself. It is plainly not enough for the courts below.

The distinctions drawn by the government with respect to *United States* v. *Dobie (II)* are (1) meaningless as to the issues here before the Court and (2) factually erroneous. E.g., contrary to the government's assertion that the delivery lists for Dobie's call were not produced in that case but were here, counsel for petitioner here, who was also Dobie's counsel, assures the Court that such a list was produced and the opinion clearly so indicates. *Dobie (II), supra,* at 420 ("The government produced the March list . . ."). As in *Dobie* however, it should be held that the government's undoing was its failure to produce lists *subsequent* to petitioner's call.

[9] *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167 (1962).

did in holding that the regulations, 32 C.F.R. §1631.7(a)(1) and §1642, lacked any statutory authority for existence. *Gutknecht, supra* at 306.

The Selective Service System's delinquency regulations, 32 C.F.R., Part 1642 (1969), at the time they came before this Court for review in *Gutknecht,* were given teeth through the priority induction provisions of 32 C.F.R. 1631.7(a) (1969). Indeed, the primary punitive sanction of the entire delinquency scheme, priority induction, was nowhere enunciated, in Part 1642. Rather, 32 C.F.R. 1642.13 provided that delinquents were to be ordered "to report for induction in the manner provided in section 1631.7 . . ." Thus, this Court in *Gutknecht* reviewed the priority induction scheme provided for in Part 1642 and executed through 1631.7(a)(1) *in extenso* and flatly invalidated the entire scheme. See 396 U.S. at 298, n. 1 and accompanying text. Moreover, the assertion that *Gutknecht* "did not involve Section 1631.7(a)", p. 7, Mem. Op., is a stunningly disingenuous retreat from the previous admission set forth in the Solicitor-General's brief at p. 136, n. 22 in *Gutknecht* v. *United States,* No. 71 Oct. 7, 1969:

> ". . . 32 C.F.R. 1631.7 . . . That regulation providing for priority induction of delinquents and volunteers ahead of all other registrants, *is in turn linked to 32 C.F.R. 1642.13,* which calls for the induction of delinquent registrants in the manner provided in section 1631.7 . . ." (Emphasis added.)

2. In *Gutknecht,* this Court primarily concerned itself with acceleration of induction through "de facto" shifting of a registrant's position in the order of call. However, another subtle, acceleratory device has now been embodied

in 1631.7,—a device which was, by the government's own admission, see p. 7, Mem. Op., used in this case. This provision authorizes the induction of delinquents without affording them a pre-induction physical examination. This procedure, applied only to delinquents[10] hardly comports with this Court's holding in *Gutknecht* that, in accordance with the language of *Sec. 5(a)(1)*,[11] "the selection of persons for training and service shall be accomplished in an "impartial manner," 396 U.S. at 304.[12]

Petitioner submits that the amended regulation's grant of authority is but a form of "de jure" acceleration which impliedly violates the holding of *Gutknecht* and is a procedure based on an invalidated regulatory scheme. *United States* v. *McClintock*, 2 SSLR 3685 (N.D. Cal. 1970), *Battiste* v. *United States*, 428 U.S. 801, 802 (5th Cir. 1970); *United States* v. *Kohls*, 441 F.2d 1076, 1077 (9th Cir. 1971). The government's assertion that *Battiste* is inapplicable because there a finding of de facto acceleration was made, see Point I, *supra*, is clearly erroneous. As we pointed out in our Petition at p. 19, the Fifth Circuit ruled the induction order invalid and did so while granting for argument's sake the government's contention here raised. See italicized portion of quote at Pet. p. 19. Indeed, the Fifth Circuit's position seems even more absolute than a mere holding that delinquent inductions of registrants who fail to appear at physical examinations are invalid. Rather, *Battiste* appears to hold that *any* delinquent induction is

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[10] And volunteers. See (A. 12a-14a).

[11] 50 U.S.C. App. §455(a)(1).

[12] It is interesting to note that the June, 1970 amendment to 1631.7, see Pet. 17, n. 9, was accomplished solely by executive order without any authorizing statutory amendment. Contra, *Gutknecht*, *supra* at 396 U.S. 307; *Greene* v. *McElroy*, 360 U.S. 474 (1959).

per se invalid because it is based on a regulatory scheme held invalid.

While a finding of prejudice to petitioner from the failure to grant him a physical would make it unnecessary for the Court to reach that question, the government's contention that no prejudice having occurred to petitioner, his order was therefore not violative of *Gutknecht*, is nevertheless unavailing for a totally separate reason. In *Clay* v. *United States*, 403 U.S. 698, 4 SSLR 3258 (1971) this Court recognized that the courts had a specific interest in insuring the legal integrity of the Selective Service System by requiring that a man's induction not be accomplished through unlawful means. There, this Court, quoting its prior decision in *Sicurella* v. *United States*, 348 U.S. 385, 392 (1955) stated, that "the integrity of the Selective Service System demands" that an induction not be accomplished through illegal means. *Clay, supra* at 3260. No less can be said for delinquency cases.

Certiorari should therefore be granted in order to clarify any doubt as to the scope and import of this Court's decision in *Gutknecht*,[13] as well as to resolve the plain inter-circuit conflict.

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[13] Of course, the answer to the now tired contention, again raised here by the government, that the Selective Service System will be stymied from operating if the conviction is reversed, was dealt with in *Gutknecht* at 396 U.S. 307. If petitioner's failure to report for his physical examination (which caused the delinquency declaration) was willful, he should be prosecuted for *that* offense. We note that even at the time of indictment here, the government sought only to prosecute petitioner for failing to report for induction and ignored the physical examination transgression.

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JAN 26 1972

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Joseph Anthony Davis,

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—v.—

United States of America.

On petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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OCTOBER TERM, 1971

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Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL MEMORANDUM

Following the filing of petitioner's reply memorandum on January 21, 1972, counsel for petitioner obtained copies of the opinions of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Fox*, —— F.2d ——, No. 71-1917 (December 30, 1971) and *Zack* v. *Benson*, —— F.2d ——, No. 71-1304 (December 30, 1971). Those opinions are annexed hereto in the appendix *infra*.

Whatever disagreement may exist between the government and petitioner with respect to his *de facto* acceleration in the order of call, see Sec. D, pp. 16-19 Pet. and Sec. 2, pp. 5-7, Reply Memorandum (hereinafter R.M.) and P. 7, Mem. Op., it is now clear under *Fox*, *supra*, that petitioner's induction order, was invalid, it having concededly been issued without a prior determination of his physical acceptability. See *Fox*, *supra* at pp. 3a-6a, *infra*. This

argument was of course urged by petitioner in his previously filed briefs.*

In light of the Ninth Circuit's intervening decision in *Fox*, the petition for a writ of certiorari should be granted or in the alternative this Court should consider the appropriateness of remanding to the Court of Appeals for the Ninth Circuit with instructions to grant a rehearing or rehearing *en banc*.

Respectfully submitted,

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* The statement by the Ninth Circuit panel in *Fox*, at p. 3a, *infra*, that neither "the nature of the delinquency . . . nor . . . the evidence of *non*-acceleration" appears in the *Davis* litigation, is, with all due respect, erroneous. First, the record in this case clearly divulges and the government acknowledges the reason for Davis' delinquency. Second, if, as the *Fox* panel contends, there is no evidence of *non*-acceleration, then the government simply cannot be held to have sustained its burden of proof on the "*de facto*" acceleration issue.

** Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin Oppenheimer of the New York Civil Liberties Union.

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit

No. 71-1917

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PETER ARTHUR FOX,

Defendant-Appellant.

[December 30, 1971]

Appeal from the United States District Court for the Central District of California

Before: MERRILL and DUNIWAY, Circuit Judges, and CROCKER,* District Judge

DUNIWAY, Circuit Judge:

Appellant Fox was convicted for failure to report for induction into the Armed Forces in violation of 50 U.S.C.App. § 462. We reverse.

Fox was declared delinquent by his Selective Service Board on July 10, 1969, for his failure to appear for pre-induction physical examinations as ordered on four separate occasions. On July 28, 1969, Fox was ordered to

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* Honorable M. D. Crocker, United States District Judge, Eastern District of California, sitting by designation.

report for induction on August 19, 1969, which he failed to do. He likewise failed to respond to two subsequent letters instructing him to report for induction based on his continuing duty to report under the original order, the last time on October 12, 1970. His indictment rested on his failure to appear on that date.

At trial, the government offered evidence from which it sought to show that Fox's induction order was not accelerated by the declaration of delinquency. The pertinent date for determining whether acceleration occurred is August 19, 1969. *United States* v. *Lane,* 9 Cir., 1971, 442 F.2d 415; *United States* v. *Dobie,* 4 Cir., 1971, 444 F.2d 417, 421. The government relied upon the August, 1969 delivery list, the July and June lists, and a list showing the birthdates of all registrants born in 1949, of whom Fox was one of the eldest. The trial judge found no acceleration and convicted.

Since the decisions in *Gutknecht* v. *United States,* 1970, 396 U.S. 205, and *Breen* v. *Selective Service Board,* 1970, 396 U.S. 460, this court has routinely reversed convictions for failure to report for or submit to induction in cases in which it appeared that the defendant had been declared delinquent by his local board and ordered to report for induction as a delinquent. We have presumed, absent evidence to the contrary, that his induction was accelerated by the declaration of delinquency. *United States* v. *Thomas,* 9 Cir., 1970, 422 F.2d 1327; *Gregory* v. *United States,* 9 Cir., 1970, 422 F.2d 1323; *United States* v. *Browning,* 9 Cir., 1970, 423 F.2d 1201; *United States* v. *Stow,* 9 Cir., 1970, 427 F.2d 891; *United States* v. *Broyles,* 9 Cir., 1970, 427 F.2d 358; *United States* v. *Supina,* 9 Cir., 1970, 428 F.2d 1226; *United States* v. *McQueary,* 9 Cir., 1970, 429 F.2d 984; *United States* v. *Townsend,* 9 Cir., 1970, 431

F.2d 702; *United States* v. *Kohls*, 9 Cir., 1971, 441 F.2d 1076, 1077; *Andre* v. *Resor*, 9 Cir., 1971, 443 F.2d 921; *United States* v. *Hayden*, 9 Cir., 1971, 445 F.2d 1365, 1369. In all of these cases except four (*Gregory, Browning, Broyles* and *Andre*), the delinquency was the same as here —failure to take a physical examination as ordered. The nature of the delinquency in *Andre* does not appear; the other three cases involved failure to carry draft cards.

In two cases, we have remanded instead of reversing, *United States* v. *Davis*, 9 Cir., 1970, 432 F.2d 1009; *United States* v. *Pennington*, 9 Cir., 1971, 439 F.2d 145. In *Davis*, the trial judge on remand found that there had been no acceleration, and we then affirmed. *United States* v. *Davis*, 9 Cir., 1971, 447 F.2d 1376. We also affirmed a similar finding in an unreported decision, *United States* v. *Misenhimer*, No. 71-1384, July 22, 1971. However, the nature of the delinquency in these cases does not appear, nor does it appear what the evidence of non-acceleration was. Thus they are of no help to either side in this case.

In the present case, we need not consider the evidence offered by the government to show that induction was not accelerated, because, under the regulations in effect at the time, Fox's induction was accelerated by the declaration of delinquency as a matter of law. Without the declaration, the Board could not have ordered him to report for induction. As in *Pennington, supra*, "[w]e feel free to [take this position] since the possibility [of doing so], is not considered in our earlier opinions." 439 F.2d at 146.

The regulations in effect at the time of Fox's induction order required the Local Board, upon receiving a Notice of Call from the State Director of Selective Service, to select and order for induction the number of men necessary to fill the call from among its registrants;

(1) who had been classified I-A or I-A-O; and

(2) who had been found acceptable for service in the Armed Forces; and

(3) to whom the Local Board had mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction.

Only two classes of registrants were excepted from the latter two of these three prerequisites for induction: delinquents and volunteers. 32 C.F.R. former § 1631.7(b).[1]

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[1] 32 C.F.R. § 1631.7(b) stated in 1969:

"(b) When a call is placed with designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and who have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction; *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether a Statement of Acceptability has been mailed to him. Such registrants shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(*continued on following page*)

No dispute exists as to the facts here. Fox was classified I-A, but he was never found to be "acceptable for service" and he was never mailed a Statement of Acceptability either at least 21 days before his induction date or at all. He was not a volunteer; thus the only authority the Local Board had for its order to Fox to report for induction was the provision of § 1631.7(b) for delinquents to be called without a previous finding of acceptability or the mailing of a Statement of Acceptability 21 days before induction. Yet that provision was part of the delinquency regulations held invalid by the Supreme Court in *Gutknecht*. The local board could not rely on that invalid regulation to order appellant's induction and there was no other valid provision of the regulations which gave the local board authority to order his induction when it did. It follows that the order of July 28, 1969, was illegal and created no duty on Fox's part to report for induction.

None of our decisions requires a contrary result. None purports to authorize what we would have to do here to conclude that no acceleration occurred. We would have to assume three things: first, that Fox did report for and

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(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Registrants in the designated age group; and registrants who previously have been deferred in Class I-S-C after attaining the age of 19 years, or who have requested and have been granted a deferment in Class II-S after the enactment of the Military Selective Service Act of 1967, and who are no longer so deferred, shall be considered as being within the age group called regardless of their actual age. These registrants shall be integrated and called according to the month and day of their birth, the oldest first. Registrants who have been deferred in Class I-S-C or Class II-S and have been integrated with a prime age group under the provisions of this paragraph shall, for the purposes of selection and call, thereafter be considered a member of such age group.

take his physical examination (although he did not); second, that as a result of that assumed examination, he would have been found acceptable for service; third, that he would then have been sent a Statement of Acceptability. We would also have to assume that all of this would have happened long enough before the declaration of delinquency and order for induction that Fox would have been available for call in August, 1969, even without the declaration of delinquency. Having made all of those assumptions, we would then have to examine the Board's records to ascertain that he was called in the proper order, as prescribed in § 1631.7(b). No case requires that we take such a voyage to "Fantasyland"; we decline to embark on it.

We realize that the result does not seem to be a desirable one; Fox was about as delinquent as it would be possible for a young man to be in relation to his various duties under the Selective Service Law. But we did not write the law or the regulations, and the defect in them that produces the result in this case has been corrected.[2] As the Court pointed out in *Gutknecht*, there was a remedy: Fox could have been prosecuted for one or more of his numerous delinquencies. But that was not done; instead, the delinquency route to accelerated induction, condemned in *Gutknecht*, was taken.

Reversed. When the mandate goes down, the indictment will be dismissed.

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[2] The regulations were amended by an Executive Order on June 16, 1970, to permit a local board to order the induction of a registrant who fails to report for a physical examination as ordered, without the necessity of first finding him acceptable for service or mailing him a Statement of Acceptability 21 days prior to induction. 32 C.F.R. § 1631.7(a).

Opinion of the United States Court of Appeals for the Ninth Circuit

No. 71-1304

ARTHUR CHARLES ZACK,

Petitioner-Appellant,

vs.

CHARLES BENSON, Camp Administrator, Stafford Federal Prison Camp, Stafford, Arizona,

Respondent-Appellee.

[December 30, 1971]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: DUNIWAY, ELY and CHOY, Circuit Judges

PER CURIAM:

The facts in this case are legally indistinguishable from those in *United States* v. *Fox*, 9 Cir., 1971, —— F.2d ——, (No. 71-1917, December 30, 1971). On the authority of that case, the judgment is

Reversed. When the mandate goes down, the conviction shall be vacated.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's supplemental memorandum calls to the court's attention the Ninth Circuit's recent decision in *United States* v. *Fox*, No. 71-1917, decided December 30, 1971. In that case, as in the present one, an induction order was issued to a registrant without a prior physical examination or statement of acceptability. This was permitted under then-applicable regulations only because the registrant had been declared a delinquent. The panel in *Fox* concluded that the delinquency declaration was infirm under this Court's

decision in *Gutknecht* v. *United States*, 396 U.S. 295, and that therefore the induction order based on it was invalid.

As our memorandum in opposition (pp. 6-7) indicates, we do not think that *Gutknecht* requires this result and thus our position remains that the decision in the present case is correct. While the holdings in *Fox* and in the present case are inconsistent, the conflict is an intra-circuit one, and presumably will be resolved by the Ninth Circuit itself in later cases. Moreover, the issue is not of continuing importance, in view of the fact that the pertinent regulations have now been amended. The new regulations, set forth in the Appendix, *infra*, provide that registrants who, like petitioner, refuse to report for a physical examination may be immediately ordered to report for induction. Such an order no longer rests in any way on a prior delinquency declaration.

For the reasons stated above and in our original memorandum in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

APPENDIX

32 C.F.R. 1631.7(a) and (b):

(a) When a call is received by a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, or for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, the Executive Secretary or clerk, if so authorized, or a local board member shall select, as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I-A or Class I-A-O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction: *Provided*, That notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined: *Provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Whenever the number of postponements of induction materially reduces the number of men the local board actually can deliver in response to a call, the local board shall issue orders to report for induction to such numbers of additional men as may be necessary to meet the call, taking into account the

number of men to be delivered following the expiration of postponements previously granted.

(b) Registrants shall be selected and ordered to report for induction in the following categories and in the order indicated:

(1) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(2) Nonvolunteers in the Extended Priority Selection Group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5.

(3) Nonvolunteers in the First Priority Selection Group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5

(4) Nonvolunteers in each of the lower priority selection groups, in turn, within the group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5

(5) Nonvolunteers who have attained the age of 19 years during the calendar year but who have not attained the age of 20 years, in the order of their dates of birth with the oldest being selected first.

(6) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(7) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

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